will not order specific enforcement of all contracts, nor will equity interfere by injunction to stop the breach of all contracts, however valid they may be.

Unquestionably the decision in the *Hurst* case would meet with popular approval. It does strike one as unjust—even though perhaps perfectly legal—that after one has purchased a ticket to attend a theatre and has taken his seat he should be subject to expulsion at any time for a bad reason or no reason at all and then be limited to an action merely for the breach of the contract with the very limited damages recoverable under such circumstances, a remedy which under our cost system is really no remedy at all. Perhaps the remedy should be considered as entirely inadequate within the meaning of that expression as a prerequisite to equitable protection. R. W. A.

JURISDICTIONAL FACTS.—The advance sheets of the Northwestern Reporter for January 29th, 1915, contain two cases in which a supreme court declared proceedings that had been carried through to judgment void (not merely voidable) because of the lack of a fact which the supreme court regarded as jurisdictional, (*Sandusky Grain Co.* v. *Sanilac Circuit Judge* (Mich. 1915), 150 N. W. 329 and *Bombolis* v. *Minn. & St. L. R. Co.* (Minn. 1914), 150 N. W. 385), and another case in which the court was equally divided as to whether the essential facts appeared (*Fisher et al* v. *Gardnier et al.* (Mich. 1915), 150 N. W. 358). Of course, it was not suspected by anyone when any of these cases was on trial in the first instance that there was any question as to jurisdiction, nor was there doubt that the judgment when rendered was valid and concluded the controversy; and in every one of them, as in nearly all such cases, relief from any real hardship could have been had by direct proceedings to vacate the objectionable judgment.

It is believed that this particular weekly issue of the advance sheets is by no means extraordinary, but rather typical. If there be any way of avoiding this continuous miscarriage of justice that is bringing our courts into common disrepute, and persuading people it is better to settle their differences elsewhere, it should be discovered and applied; and before accepting it as a necessary evil we should be thoroughly satisfied that it is necessary. If it be said, "let lawyers conform to the law;" the answer is that the lawyers are not the greatest sufferers, nor does experience indicate that a remedy is to be had by disregarding the prior proceeding on collateral attack.

Let us first see what facts are necessarily and admittedly jurisdictional; and the result of the analysis may help us to see whether the evil has not in considerable part come from holding facts to be jurisdictional which by their nature are not so. It is believed that the following are the facts and the only facts that are generally admitted to be jurisdictional, and the only facts that are by the exigencies of the case required to be treated as jurisdictional. To add to the list unnecessarily multiplies disaster without corresponding advantage. The list follows: (1) A court *de facto* (2) called to action in the premises (3) by the parties affected on the one side, and (4) possession of the thing affected, by seizure or its equivalent, and such indirect substituted notice to all persons liable to be adversely affected by the judgment as is

by its nature fairly calculated to reach them, warning them to appear and defend. *Roller* v. *Holly,* 176 U. S. 398, 20 Sup. Ct. 410.

These four essentials are believed to complete the list of indispensible *facts* to enable the court to proceed *in rem.* That the persons adversely affected did not in fact get the notice is not a jurisdictional defect; but if they do get it, appear, offer to defend, and are then refused a hearing, the court is held to lose its jurisdiction. *Windsor* v. *McVeigh,* 93 U. S. 274. If the judgment is only to operate *in personam* jurisdiction of the thing by seizure or its equivalent is not necessary. But if the judgment is to have any validity *in personam* it is essential (5) that the court have jurisdiction of the parties adversely affected, either by their voluntary appearance and submission to the jurisdiction of the court, or by service of the court's process on them, either in some manner which they have in advance agreed to (as by giving a judgment note authorizing the payee to enter appearance for the maker upon default), or by personal service upon them within the court's territorial jurisdiction. No legislative enactment can dispense with this requirement. *Pennoyer* v. *Neff,* 95 U. S. 714.

With these four or five essentials in mind, let us look at the recent decisions above referred to, and first the case of *Sandusky Grain Co.* v. *Sanilac Circuit Judge* (Mich.), 150 N. W. 329; in which the Supreme Court of Michigan issued a writ of mandamus ordering the Sanilac circuit judge to grant an injunction restraining the Detroit, Bay City and Western Railroad Company from constructing a spur track down a street in accordance with a judgment of the probate court of the county in eminent domain proceedings. The objection to the order of the probate court was that the probate judge and the sheriff who made the jury list in that proceeding were stockholders of the company to whose plant the spur line was to be built. It will be observed that this is not a collateral proceeding, but a suit instituted for the sole purpose of vacating the objectionable order; and though appeal or some other proceeding might be more direct, that is a matter of practice; and ever since Lord COKE failed in his desperate attempt as Chief Justice of the King's Court to prevent the chancellor interfering with the court's business by such restraining orders, it has been the common practice of courts of chancery to restrain parties from proceeding under judgments obtained in law courts under unconscionable circumstances. But in rendering the judgment of the court in the recent case above referred to Mr. Justice OSTRANDER *said* that the judgments of a disqualified judge are not voidable merely but void. It would seem that the procedure adopted in this case would be appropriate though the judgment were only voidable by reason of the interest of the judge in the decision. If the judgment is void it cannot be given any force by any length of acquiescence in it by both parties. The fact that the judge was disqualified would rarely appear on the face of the proceedings and might not be discovered nor discoverable till many persons had changed their position in reliance on the judgment and could not be restored to *statu quo.* If a qualified judge is a jurisdictional element it is because this fact is essential to the first requisite of jurisdiction above enumer-

ated. Certainly no judge should be permitted to decide his own case, and there are decisions to the effect that judgments rendered by an interested judge are not merely voidable but void. It is believed, however, that it would be better to hold the parties bound by the judgment unless they had it avoided by some proceeding instituted for the purpose as in this instance. On principle, a disqualified judge exercising the office is a judge *de facto,* to say the least, so that his acts should be valid so far as the public is concerned; and the generally accepted view is that objection on account of the disqualification of the judge can be taken only in the original proceeding (*Fowler* v. *Brooks,* 64 N. H. 423, 13 Atl. 417, 10 Am. St. Rep. 425; *Carr* v. *Duhme,* 167 Ind. 76, 78 N. E. 322, 10 Ann. Cas. 967; *Jeffers* v. *Jeffers,* 89 S. C. 244, 71 S. E. 810; *State* v. *Ross,* 118 Mo. 23, 23 S. W. 196; *Race* v. *Reed,* 138 Ky. 605, 128 S. W. 891) and it has even been held that after the trial has commenced it is too late to make the objection on account of the disability of the judge. *Ex Parte Hilton,* 64 S. C. 201, 41 S. E. 978, 92 Am. St. Rep. 800. The same logic that would render a judgment liable to collateral attack because the judge was disqualified would make it void if the jury was disqualified. If the judgment is void because something is done which the law forbids, every erroneous judgment is void, and therefore every judgment is void, for error can always be charged, and to try the question of error or not is to re-try the case.

The second recent case above referred to is *Bombolis* v. *Minneapolis & St. L. Ry. Co.* (Minn.), 150 N. W. 385; in which the Supreme Court of Minnesota held that the court below did not err in excluding from evidence certified copies of proceedings in the probate court appointing a special administrator, with whom defendant had made a settlement for the negligent killing for which damages were claimed in this case. The ground on which the exclusion was justified was that the statute providing for the appointment of administrators required that a petition for such appointment should be made in writing specifying the essential facts, etc.; and the court found that no written petition was in fact filed, none being found in the files, and assumed that there was an oral petition.

Now, it is submitted that if the law requires the petition to be so and so, and a petition is made to the court, the court is bound to decide whether the petition is sufficient or not, and that decision is final and binding on all persons until vacated by appeal or other appropriate proceeding. If no petition at all is presented the court cannot act. It cannot act spontaneously. But if moved by oral petition when a written petition is required by law, the court is bound either to grant or deny the petition, to act on it or hold it insufficient. And power to decide that it is insufficient includes power to rule that it is sufficient. Power to decide includes power to err. If every judgment not warranted by law is void, every judgment is void, for it is then open to all persons at any time to aver and prove that the prior ruling was unwarranted by law or fact. And to conclude further agitation of the question is the only purpose of any judicial proceeding. To say that the law forbids the court acting on an oral petition proves nothing; for the same

law forbids the court to sustain an insufficient written petition, or to sustain a sufficient written petition on insufficient proof. Whether the petition is sufficient and whether it is sustained by the proof are exclusively within the province of the trial court, and its decision thereon concludes all persons till vacated or reversed in some manner recognized by law. In the case of *Windsor* v. *McVeigh,* above cited, Mr. Justice FIELD, of the United States Supreme Court said, *arguendo,* "The decree of a court of equity on oral allegations, without written pleadings, would be an idle act, of no force beyond that of an advisory proceeding of the chancellor." But when the point became material to the decision of a later case he did not hesitate to decide that the form of the pleadings was not jurisdictional. He said: "The validity of this partition is assailed because no complaint or petition of the applicant for the partition appears in the record as the foundation of the proceedings, and without one it is contended that they were void. The statute does not in terms require the application of the proprietor seeking a partition to be presented in writing, or if one be presented, to be found among the records of the court. * * * When application is made, the court must consider whether it is by a proper party, and whether it is sufficient in form and substance. * * * Its order made thereon is an adjudication upon these matters. * * * This conclusion is not open to collateral attack." *Hall* v. *Law,* 102 U. S. 461. Similar decisions are to be found in many of the states, including the very court rendering the decision now being reviewed. *Kimball* v. *Brown,* 77 Minn. 167, 75 N. W. 1043; *Tremble* v. *Williams,* 18 Neb. 144, 24 N. W. 716; *Leach* v. *Western Ry. Co.,* 65 N. C. 486; *Robbins* v. *Tuffs,* 12 R. I. 67; *Emerson* v. *Ross,* 17 Fla. 122. See also article in 10 MICH. LAW REV. 384-391. Clearly the petition is jurisdictional; and just as clearly the form and sufficiency of it are not jurisdictional.

The last of the recent cases above referred to is *Fisher* v. *Gardnier* (Mich.), 150 N. W. 358, in which the Supreme Court of Michigan, being equally divided, affirmed a decree quieting title in the complainant, as adopted daughter and heir of Ira Fisher, against the contentions of the next of kin of Ira's mother, claiming under her will, and contending that the adoption of the complainant was void because the record of the adoption proceedings did not show that the adoption was with the consent of the principal officer of the institution in which complainant was then kept as an abandoned child, nor that J. S., who purported to give such consent had authority to do so, and that the statute prescribing the practice in adoption proceedings had not been substantially followed.

Recurring to the enumeration of jurisdictional facts it is manifest that if the adoption suit be regarded as a proceeding *in personam* jurisdiction in so far as Ira Fisher was concerned was obtained by virtue of his voluntary appearance and written petition to the court to decree that the present complainant was his adopted child. If the proceeding be regarded as *in personam* against the infant, it would seem clear that the recognition of J. S. as sponsor for her was a sufficient recognition of J. S. as guardian *ad litem* of the infant defendant in her custody, admitting for the sake of argument that actual

appointment of a guardian *ad litem* is jurisdictional to a proceeding against an infant actually and physically before the court in a suit instituted before the court to determine the rights of the infant. See 10 ENC. PL. & PR. 630-633; *Langstein Bros.* v. *O'Brien* (1895), 106 Ala. 352, 17 So. 550, 30 L. R. A. 707. If the adoption suit be regarded as a suit *in rem* it is not claimed that the record indicates absence of the infant, or want of any notice by publication. Indeed, the record shows the appearance of J. S., "the only person having the custody and control of said minor, and lawfully entitled to give consent." The judges of the supreme court were agreed that there must be substantial compliance with the requirements of the statute prescribing the procedure in adoption cases, in order to confer jurisdiction on the court; but differed as to whether the present record showed substantial compliance. Such has been the rule in Michigan at least since the case of *Greenvault* v. *Farmers' and Mechanics' Bank* (1847), 2 Douglass 498. The more logical rule, and one more productive of practical justice, is the one adopted by the Supreme Court of the United States, that procedure is not jurisdictional, and departures are waived if not objected to and rectified in the same proceeding. *Cooper* v. *Reynolds*, 77 U. S. 308.

The rule adopted by the Supreme Court of Michigan, that substantial compliance with all the statutory procedural requirements is jurisdictional, defeats its own purpose. The more careful the legislature has been to safeguard the proceeding, the more certain is it that it will be void. The more precautions there are to be observed, the greater the probability that one or more of them will be overlooked or indifferently observed. If it be an administrator's sale, an attachment, a partition proceeding, or any other resulting in property being sold, the greater precaution by the legislature to have notice to all parties and the public, open public bidding, time, place, etc., that the property may be safely kept, and well sold, the more certain will the bidders at the sale be that they are buying only one chance in a dozen or in a hundred of getting title, and will bid accordingly; and thus a purpose of protecting the debtors, heirs, etc., produces their ruin. Ample protection to everyone is secured by enabling them to insist in the proceeding itself that all requirements be observed, with the privilege of waiving compliance when it is burdensome rather than beneficial. Disaster only is the fruit of sustaining collateral attacks. In most instances if the only effect of making objection were to have the defect amended, the objection would not be thought worth the making. J. R. R.

THE POWER OF A PUBLIC SERVICE COMMISSION TO COMPEL THE PERFORMANCE OF A SERVICE WHICH BY ITSELF IS UNREMUNERATIVE.—The Public Service Commission of West Virginia had ordered the appellant to put on passenger service for the accommodation of a small town on one of its branch lines so as to give it adequate connections with the main line of appellant. The case was argued on the theory that the returns from this particular service would not cover the costs thereof, and it appears further that there was some doubt as to whether the total returns on the line from both the service ordered and the existing freight traffic would cover the total costs of the